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HAROLD B. WILLEY,

In the Supreme Court of the United States

OCTOBER TERM, 1954.

No. 654..

SYLVESTER PAPALARDO and PATSY LAVELLE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered on the 15th day of December, 1954, affirming a judgment of conviction in this criminal cause.

The petitioners seek a review of the decision and Order of the United States Court of Appeals for the Sixth Circuit which affirmed a conviction by a jury in the District Court of the Northern District of Ohio at Cleveland, Ohio, and a sentence that petitioner Sylvester Papalardo serve fifteen years in a penal institution and pay a fine of $8,000.00, and that petitioner Patsy Lavelle serve thirteen years in a penal institution and pay a fine of $400.00.

OPINIONS BELOW.

The District Court did not render an opinion. The District Court's charge to the jury is printed at Record page 45b.

The Affirmance in the United States Court of Appeals for the Sixth Circuit is styled Order and is also printed at the end of the within Petition and a copy of same is set forth at the end of the certified copy of the Record submitted herewith.

JURISDICTION.

The jurisdiction of this Court is invoked under Rule 37b of the Rules of Criminal Procedure and Title 28, Section 1254 United States Code.

The verdict was affirmed on December 15, 1954. Rehearing was denied February 11, 1955, and the time for filing the Petition for Writ of Certiorari expires on the 13th day of March, 1955.

QUESTIONS PRESENTED.

In the instant case, under a four count indictment charging that the petitioner and a co-defendant and two co-conspirators (neither indicted and one of whom remained unknown), unlawfully conspired to sell and did sell narcotics.

Was it not prejudicial error to admit evidence of conversations allegedly held between the petitioners and a special employee of the Government, one Pringleton, who was named as a co-conspirator and not indicted, the conversations taking place in the petitioner's automobile?

This co-conspirator, the special employee of the Government, being a friend of the petitioners arranged to meet

them in this petitioner's automobile, and he entered this automobile carrying concealed upon his person a microphone and a miniature radio transmitter, thus causing the conversations to be radioed to the world outside of the petitioner's automobile, where it could be picked up by a radio receiving set operated by two United States Treasury Department narcotic agents; said agents then testified in Court in respect to the alleged conversations. The narcotic agents' testimony was based entirely upon alleged refreshing of their memory by the use of secondary evidence consisting of notes claimed to have been prepared by them some time after they heard this testimony. Should not this evidence have been excluded:

A. In violation of the provisions of Section 605 of Title 47, U. S. C., The Federal Communications Act?

B. In violation of petitioner's Constitutional rights guaranteed him under the Fourth and Fifth Amendments of the Constitution of the United States?

Should not this evidence also be ruled inadmissible by reason of the inherent power of this Court to formulate Rules of Evidence for Federal criminal trials guided by the cause of justice?

Objection to the admission of the said evidence was duly taken. (Record p. 670 and Record p. 463.)

Another question that presents itself in the instant case:

Did the Appellate Court for the Sixth Circuit have a right to find that the appellant Papalardo was an aider and abettor rather than a conspirator in view of a verdict by the jury that this appellant was guilty of conspiracy and three sales of narcotics, and the appeal to the Sixth Circuit was based on the ground that there was double jeopardy involved because the

evidence upon which the appellant was convicted in the first count of the indictment, charging conspiracy, was the same evidence upon which he was convicted in each of the three substantive counts, especially in view of the District Court's imposition of a sentence on the conspiracy count and consecutive sentences which was in line with the jury verdict, and was it not double punishment in view of the same evidence being used to convict both on the conspiracy and the substantive counts?

STATUTES INVOLVED.

Title 26, Section 2554, U. S. C.:

"Order forms.—(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

Title 47, Section 605, U. S. C.:

"Unauthorized publication or use of communications.—No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena is-

sued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: Provided, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress (June 19, 1934, e. 652, 605, 48 Stat. 1103.)"

Title 18, Sections 2a and 2b, U. S. C.:

Section 2a: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission is a principal."

Section 2b: "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

STATEMENT.

The petitioners were charged in a four count indictment as follows: Count 1, Conspiracy to violate the narcotic laws of the United States, which conspiracy count was in violation of Section 371, Title 18, U. S. C. Counts 2, 3, 4 and 5 were the substantive counts, each charging an offense of sale of narcotics in violation of Section 2554, Title 26, U. S. C.

The claim of the prosecution was that the two petitioners together with one Pringleton conspired to violate the narcotic laws by the sale of narcotics, as mentioned above. The story in brief is as follows. A Government informer named Pringleton claimed that he met Papalardo in June of 1952, and that Papalardo informed him that if he needed narcotics that he should call him (Papalardo). That about seven months later he (Pringleton) did call Papalardo, who introduced him to some man known as "Art" (who has remained unknown to this date), and that this fellow "Art" later that day or night introduced him to Patsy Lavelle, one of the Petitioners herein, who made arrangements and did supply Pringleton with narcotics. That thereafter Pringleton was arrested by the narcotic agents and secretly undertook to work for them as an informer in order that he receive a lighter sentence. This was on January 31, 1953. He testified that thereafter, unbeknown to Papalardo and Lavelle, he contacted Lavelle a number of times and brought another undercover agent to buy narcotics from Lavelle. He testified he never bought narcotics from Papalardo and never made any other arrangements about purchasing narcotics from Papalardo, and this informer Pringleton admitted that on several occasions he tried to engage the petitioner Papalardo in conversation about narcotics so that same could be witnessed and overheard by this undercover agent, but that he did not

succeed in doing so at any time in the presence of any other Federal agent or other witness.

That he continued to try to do so in various manners, over the telephone and personal conversations, and that at one time he did make an appointment with Papalardo to meet him at a certain street in Cleveland in order to discuss a certain other business matter, as he called it, that would take place in Detroit (this alleged business matter was supposed to be a policy or numbers business in Detroit). That this arrangement for the meet was made at the instigation of the agents, and that they arranged to be present in another automobile to observe the meet. It was testified that the agents then strapped a "walkie talkie" receiver, or short wave radio transmitter to the body of this Pringleton, and that they arranged to have a Government car follow within 3 or 4 car lengths, and that they tuned certain apparatus in the Government car in order to enable them to hear whatever would take place in the automobile as they travelled. It was also arranged that Pringleton try to make a buy of narcotics and that he engage his discussion direct with the petitioner Papalardo, which he tried to do throughout the trip without success. He, Pringleton, did have on his person $1,000.00 of Government money, which he offered to Papalardo in a conversation about a purchase of narcotics that would take place the next day, but that Papalardo had refused and did not take any money from him.

It should be stated that at the meeting that day, and unbeknown to Papalardo, Patsy Lavelle was also contacted by Pringleton so that the three met at the given time, and being there both Pringleton and Lavelle entered the automobile that was being driven by Papalardo. So that when Pringleton was directing his talk to Papalardo, Papalardo always answered him, "Why do you talk to me about these

things. You have been dealing with this man Lavelle," but Pringleton persisted in his talk with Papalardo, and in trying to pass the money to him, and that he could not do so, and after the automobile had stopped at a certain place on the route, Pringleton and Lavelle stepped out of the car, and then Pringleton gave the money to Lavelle and made the arrangements with Lavelle to get narcotics from him the day after.

However, it is claimed that while the Government agents did not hear the whole conversation, they heard some statements and sentences which they claim went to establish the conspiracy as charged in this indictment.

It is not claimed by the Government that Papalardo directly took part in any conversation or any activity in the narcotic business save and except that one statement that Pringleton claims that Papalardo made in June of 1952, about seven months before Pringleton even met Lavelle.

The portions of the conversations that these agents claim to have overheard during the trip with the "walkie talkie" in themselves could not further the object of this conspiracy but did indicate that Petitioner knew that Pringleton and Lavelle were dealing together. Although Pringleton admitted that he was there for the purpose of engaging Papalardo in conversations about obtaining narcotics, he failed because Papalardo did, at no time, discuss the receiving or selling or buying or handling of narcotics with or for Pringleton, and during no part of the conversation can it be shown that Papalardo said anything to Pringleton at that time, or at any other time that would further the object of this conspiracy, if this was a conspiracy, or that could have substantiated the charges of sale.

REASONS FOR ALLOWING THE WRIT.

The issues presented by the questions propounded *supra* have once been passed upon directly by this Honorable Court. The case is *On Lee vs. United States,* 72 Supreme Court, 967; 343 U. S. 747. In that case by a five to four Opinion this Honorable Court decided against the appellant and the following Justices dissented: Mr. Justice Burton, Mr. Justice Douglas, Mr. Justice Frankfurter, and Mr. Justice Black. The case presents the use of technical instruments and is extremely interesting, and is raised as an important issue here as to whether or not the use by Government employees of the short wave radio set, introduced into the appellant's automobile by stealth and subterfuge, does not violate the defendant's Constitutional guarantees granted him under the Fourth and Fifth Amendments of the Constitution. While there is a ruling previously made by this Court in 1952 in a similar case, it seems to the pleader of sufficient importance to ask this Court once more to admit this case for review because of the closeness of the decision and because of the sharp differences that sprang up over the *On Lee* conviction. Since the decision on *On Lee,* there is evidence of a great tendency to use such mechanical devices, and that its use is undoubtedly spawned by this ruling.

This case also presents another issue, and that is in a case where the jury found the appellant guilty of one count of conspiracy and three counts of sale, and where the question is whether or not the same evidence was used on the substantive offenses to constitute the conspiracy charge, which did constitute double punishment in view of the consecutive sentences, does the Appellate Court have a right to make a finding that this petitioner was found guilty by the jury as an aider and abettor rather than on the actual finding of the jury which was conspiracy and sales.

The issues set forth above present extremely important questions of Constitutional and Federal Law: important to the general public and the Bench and Bar.

ARGUMENT.

Point I.

The receipt of the testimony of informer Pringleton and agents Ellis and Voll concerning conversations between Pringleton and petitioner, allegedly overheard by means of the use of a radio transmitter operated by informer Pringleton and a radio receiver operated by agents Ellis and Voll was error prejudicial to the petitioner.

Over the objection of counsel, Federal Narcotic Agents Ellis and Voll and informer Pringleton were permitted to testify to the receipt by radio of radio broadcasts of conversations alleged to have been had between Pringleton, special Government employee, and the petitioner. This testimony was objectionable and highly prejudicial to the petitioner and should have been excluded for three reasons.

1. In violation of the provisions of Section 605, Title 47, U. S. C., The Federal Communications Act.
2. In violation of petitioner's Constitutional rights guaranteed him under the Fourth and Fifth Amendments of the Constitution of the United States.
3. By reason of the inherent power of the Court to formulate Rules of Evidence for Federal Criminal trials guided by the cause of justice.

The Courts of this country and particularly this Honorable Court, have repeatedly found it necessary to

curtail the activities of law enforcement agencies, and particularly the means and methods used to gain evidence. In fact in *United States vs. Trupiano,* 334 U. S. 699, this Court took great pains to point out that it was still necessary for the Courts to lay down and enforce the rules concerning the gathering of evidence. In this case, the Court said at 705:

> "In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the Constitutional rights of the suspect must be viewed."

If the ruling in the instant case is permitted to stand, no one will be safe in talking to a friend, acquaintance, or business associate, no matter where such conversation might take place, unless and until he has conducted a thorough and complete investigation and search of the person of the party with whom he is conducting the conversation, or in police parlance he has "frisked" the individual.

If because of modern science we are to live under the constant threat of having our words and very thoughts broadcast to the world or to individuals we do not even know, then our theory of the inherent right of every member of our society in these United States to liberty becomes a mockery and travesty and mere cant.

Judicial approval of the conduct of the Federal employees in the instant case can only produce repeated and worse offenses of this nature.

The actions of the Government agents and employees in this case is what we hear as now occurring in those countries "beyond the iron curtain" and certainly do not conform to the concepts within our country of those

"certain inalienable rights, that among these are life, liberty, and the pursuit of happiness"

with which the second paragraph of our Declaration of Independence informs the world all men are endowed.

The inherent power of this Honorable Court to formulate rules of evidence in federal criminal trials guided by the consideration of justice and the rejection of evidence obtained in the manner and by the devices used in the obtaining of evidence of the conversations had by Pringleton and the petitioner.

This Court has ruled in *McNabb vs. United States,* 318 U. S. 332 that in the interest of justice this Court can and should reject evidence improperly obtained by federal officers, the Court stated at 341:

"The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those tried solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal Courts, see Nardone vs. United States, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions * * * and in formulating such rules of evidence for federal criminal trials the Court has been guided by consideration of justice not limited to the strict canons of evidentiary relevance."

If this Honorable Court is of the opinion that the evidence in question was not obtained in violation of the petitioner's Constitutional rights or in violation of the provisions of Section 605 of Title 47, U. S. C., could there be a more proper place for this Court to state and exercise what it has classified as its inherent right to formulate

rules of criminal evidence and to direct the rejection of the evidence in the instant case and in the future all evidence obtained by the means and method employed by the Government in this case.

Point II.

Did the Appellate Court for the Sixth Circuit have a right to find that the appellant was an aider and abettor rather than a conspirator in view of the finding of the jury that this appellant was guilty of conspiracy and three sales of narcotics, and the appeal to the Sixth Circuit was based on the ground that there was double jeopardy involved because the evidence upon which he was convicted in each of the three substantive counts, especially in view of the District Court's imposition of a sentence on the conspiracy count which was in line with the jury verdict, and was it not double punishment in view of the same evidence being used to convict both on the conspiracy and the substantive counts?

The jury in the District Court found the defendants guilty of Count No. 1, the conspiracy count, and the substantive counts, being sales of narcotics, 2, 3, and 4 of the indictment.

However the Appellate Court for the Sixth Circuit makes only a finding that

> "There is substantial evidence to support a conviction of appellant Papalardo on the 2nd, 3rd, and 4th counts of the indictment charging separate substantive offenses in selling heroin in violation of the anti-narcotic laws of the United States."

From that we take that the Court of Appeals does not find that there was substantial evidence to convict on the

first count of the indictment, which is the conspiracy count. The Court of Appeals continues:

> "The point has been made and argued that there is double jeopardy involved in that the evidence upon which the appellant was convicted in the first count of the indictment charging conspiracy, was the same evidence on which he was convicted in each of the three substantive counts and that an aider and abettor is actually a conspirator."

The Appellate Court further finds:

> "And there was evidence substantial in character to show that appellant was an aider and abettor in each of such sales although he was not present in person when the heroin was sold or when it was delivered to the purchasers."

It is therefore safe to say that the Appellate Court considered Papalardo guilty as an aider and abettor only and not on the count of conspiracy, and that therefore the conspiracy count was not made or established.

The question arises whether the necessary proof in counts 2, 3, and 4 of this indictment, of unlawful sale of narcotics to Pringleton and Laster, included every element of the offense charged in the first count of the indictment charging conspiracy to commit substantive offenses. If so, then it would constitute double punishment and the punishments on either the conspiracy count or the sale counts would be illegal. Because the law is where it is necessary in proving one offense to prove every essential element of another growing out of the same act, conviction of the former is a bar to prosecution for the latter.

The evidence in this case shows that the charge of conspiracy was being made because of concerted action of two or more of those named in the indictment. It should be remembered that Papalardo did not actually make any

sale of narcotics either by handling money or handling the narcotics or in any other way. The most that can be said, if everything can be believed of the Government's testimony, is that he had someone else do the buying or the selling. For instance that he procured others to do it, and it is on that basis of the testimony that he was found guilty of the first count of the indictment, namely the conspiracy count.

The facts in this case are closely analogous to the case of *Freeman vs. United States,* 6th Circuit, 146 F. (2d) 978. This *Freeman* case was distinguished in the case of *Pinkerton vs. United States,* 328 U. S. 640-644, 66 Supreme Court 1180-82, where the Court says that:

"It is only an identity of offenses which is fatal."

The Court in the *Freeman* case in speaking of the test to be applied says on page 979:

"The test to be applied here is whether it was necessary in proving the sales to prove every essential element of the conspiracy."

So we see that the test to be applied in determining whether the offense of unlawfully selling heroin was a different offense than the offense of conspiracy to commit offense of unlawfully selling heroin is whether it was necessary in proving the sales to prove every essential element of the conspiracy. It is our contention that this is exactly what took place in the Papalardo case. To prove the conspiracy, it was necessary to prove the sales of heroin therefore it became necessary to prove every element of the conspiracy in this case. And we therefore believe that consecutive sentences on the conspiracy as well as the sale counts do constitute double jeopardy because only one offense was committed and either the sentence on the conspiracy or on the sales counts should be set aside.

In the same Sixth Circuit there is the case of *Krench vs. United States*, 42 F. (2d) 354 and *Lisansky vs. United States*, Fourth Circuit, 31 F. (2d) 846-849. Also the case of *Reynolds vs. United States*, Sixth Circuit, 280 Fed. 1.

Point III.

The Court refused special request for Instructions No. 5 and No. 15, which are as follows:

Instruction No. 5: "The Court charges the jury that mere knowledge that a co-conspirator is engaged in other criminal conspiracies, with other persons, of the same general nature, is not sufficient to make conspirator a party thereto."

Instruction No. 15: "The Court further charges the jury that mere ability or opportunity to commit the crime, or presence at the scene or association and companionship with others charged with the commission of such crime is not sufficient to convict the defendant, Papalardo, and your verdict should be not guilty."

Counsel for petitioner in brief and argument in the United States Court of Appeals did contend that the District Judge erred in not giving the above instructions, and we think that his failure to do so constitutes reversible error. For the reason that there was evidence introduced to the effect that this petitioner together with Government informer Pringleton and co-defendant Lavelle were riding in this appellant's automobile on highways near Cleveland where it is claimed that two narcotic agents overheard conversations between the appellant, the informer, and the co-defendant (Lavelle). During those conversations it is claimed by the prosecution that appellant Papalardo knew that Lavelle was engaging in nar-

cotic trafficking with Pringleton. During that conversation it was also established that the appellant refused to participate in any sale to Pringleton or between Lavelle and Pringleton, and we believe this is established by the portions of the conversations the Government witnesses claimed to have heard. In view of that, it does become important whether the mere knowledge of the appellant of such engagement between Lavelle and Pringleton is sufficient to connect him in the conspiracy or the mere association would be sufficient, and it is because of that that counsel requested the District Court to charge the jury that such mere knowledge and such mere association is not sufficient to connect Papalardo with the conspiracy. We believe the Court's refusal to do so prejudiced this case and constituted reversible error.

Point IV.

Certain evidence of packages of narcotics were introduced as narcotics having been bought by one named Rollins from Bailey Douglas, who were not named in this indictment either as defendants or as co-conspirators. This evidence went in over objection of counsel, and it was claimed by the presecution that Bailey Douglas bought narcotics from Pringleton and in turn sold them to Rollins, not in the presence or with the knowledge of this appellant, and these sales were supposed to have taken place on January 24th and January 30th and constituted Count 2 of the indictment.

We believe that it was reversible error for the Court to overrule objections to the introduction of this evidence on the ground that there was not established sufficient continuity in the possession of these packages of narcotics and on the alleged sales of January 24th and January 30th

from Bailey Douglas to Rollins and from Pringleton to Bailey Douglas and from Lavelle to Pringleton.

These narcotics were seized by Agent Laster from Floyd Rollins. Rollins claimed that he bought these drugs from a man named Bailey Douglas. Douglas in turn claims that he paid Pringleton for them and that Pringleton pointed out to him where the stuff was lying on the ground. Pringleton in turn claims that he did not touch or handle the narcotics but that it was pointed out to him by Lavelle. No witness saw any of these transactions and no claim that Papalardo had anything to do with these on those days or on the subsequent days, but the Court permitted this evidence to remain over objection as stated above.

We believe that the admission of this evidence over counsel's objection was prejudicial error in view of the fact that, as we stated before, there was not established a sufficient continuity in the possession of the evidence by any one of these persons as affecting the appellant, or even Lavelle for that matter, to warrant the introduction of same against petitioner Papalardo and the Court should not have permitted this evidence to go to the jury.

We desire to add to this argument that Pringleton became a Government informer on January 31st, after the first sale. The Court of Appeals, in its Order, makes a finding that there was substantial evidence to convict the appellant as an aider and abettor on counts 2, 3 and 4, and omits the conspiracy count No. 1. Evidently, it does not believe that same was established and goes on the theory of aiding and abetting rather than conspiracy. The law of aiding and abetting is clear and in order to become an aider and abettor under Sections 2a and 2b of Title 18, U. S. C., that it must appear that one who is charged with participation in a crime must be present

either actually or constructively for the purpose of assisting therein. The law is clear that it implies some conduct of an affirmative nature and mere negative acquiescence is not sufficient. (See page 5, *supra.*)

CONCLUSION.

It is respectfully submitted that the questions submitted indicate serious errors concerning novel questions and warrant the exercise of this Court's supervisory jurisdiction by issuance of a Writ of Certiorari.

Respectfully submitted,

HENRY C. LAVINE,

Attorney for Petitioners.

APPENDIX.

Judgment of the United States Court of Appeals For the Sixth Circuit.

(Entered December 15, 1954.)

Before SIMONS, *Chief Judge*; MARTIN AND STEWART, *Circuit Judges.*

This case has been duly heard and considered on the record and on the oral arguments and briefs of the attorneys:

From which it appears that there is substantial evidence to support the conviction of appellant Papalardo on the second, third and fourth counts of the indictment, charging separate substantive offenses in selling heroin in violation of the Anti-Narcotic Laws of the United States. Each of the three counts charged unlawful sales of the prohibited drug on different dates; and there was evidence, substantial in character, to show that appellant was an aider and abettor in each of such sales, although he was not present in person when the heroin was sold or when it was delivered to the purchasers.

The point has been made and argued that there is double jeopardy involved in that the evidence upon which appellant was convicted in the first count of the indictment, charging conspiracy, was the same evidence upon which he was convicted in each of the three substantive counts, and that an aider and abettor is actually a conspirator.

Inasmuch as sentence on the first count—charging conspiracy—was pronounced by the district judge to run concurrently with that on the second count, the point becomes immaterial, even if correctly made, as no prejudice would result to appellant in view of the fact that

he would serve no additional period of imprisonment should his conviction of conspiracy be upheld. We find substantial evidence to support his conviction on count two, charging a substantive offense. The sentences on counts three and four were pronounced to run consecutively to the sentence imposed on counts one and two, providing expressly a total term of imprisonment for fifteen years, which falls within the prescribed limits of the statute.

The judgments of conviction and sentence as to Appellant Papalardo are, accordingly, affirmed.

Appellant Lavelle, convicted on all four counts of the indictment, was sentenced to serve four years on the first, or conspiracy, count and three years on each of the three substantive counts: all of which were to be served consecutively for a total of thirteen years. In our opinion, Lavelle was shown by substantial evidence to be guilty on the conspiracy count and on each of the three substantive counts. The evidence upon which he was convicted of conspiracy did not rest alone upon the evidence of his personal participation in the respective sales of narcotics. Wherefore, the judgment of conviction and sentence in his case should be upheld; and the judgment as to him is, therefore affirmed.

(s) JOHN D. MARTIN,

United States Circuit Judge.

Order Denying Petition for Rehearing.

(Filed February 11, 1955.)

The petition for rehearing is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 654

SYLVESTER PAPALARDO AND PATSY LAVELLE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 20) is reported at 218 F. 2d 694.

JURISDICTION

The judgment of the court of appeals was entered December 15, 1954 (Pet. 20), and a petition for rehearing was denied on February 11, 1955 (Pet. 21). The petition for a writ of certiorari was filed March 14, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. (a) Whether petitioners' rights under the Fourth Amendment to the United States Constitution were violated by admission of testimony with respect to conversations held in petitioner Papalardo's automobile by petitioners and a special employee of the narcotics bureau and transmitted by a microphone hidden on the employee's person to a receiving set operated by narcotic agents following in another automobile.

(b) Whether use of the transmitter violated the Federal Communications Act, 47 U. S. C. 605.

2. Whether sufficient evidence supported the verdicts on all counts of the indictment and whether sentence on the conspiracy count constituted double punishment.

STATUTES INVOLVED

26 U. S. C. 2554 (a):

> ORDER FORMS.—(a) *General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

* * * * *

26 U. S. C. 2557 (b):

> Whoever commits an offense or conspires to commit an offense described in this subchapter, * * * for which no specific pen-

alty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *

18 U. S. C. 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

47 U. S. C. 605:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the

existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *.

STATEMENT

Petitioners were found guilty by a jury in the United States District Court for the Northern District of Ohio on all counts of a four-count indictment (P. A. 4–9),[1] charging them with a conspiracy to sell illicit narcotics and with the substantive offenses of making three sales thereof, in violation of 26 U. S. C. 2554, *supra,* p. 2. Papalardo was sentenced to five years imprison-

[1] The Appendix to petitioners' brief in the Court of Appeals is designated as "P. A."; the government's Appendix is designated as "G. A."

ment and a $2,000 fine on each count. The sentences on counts one and two were to run concurrently and the sentences on the other two counts consecutively to the first two, thus totalling 15 years imprisonment and fines amounting to $8,000 (P. A. 61). Petitioner Lavelle was sentenced to serve four years on the conspiracy count and three years on each of the three substantive counts, all of which were to be served consecutively (Pet. 21), making a total sentence of 13 years. The court of appeals affirmed the convictions (Pet. 20, 218 F. 2d 694).

The evidence pertinent to the issues raised by the petition for a writ of certiorari may be summarized as follows:

Petitioner Papalardo told John Pringleton that "a lot of stuff [narcotics] was being handled out on the East end" and suggested he might make money in the business. He instructed Pringleton to "look into it" and call him "in case you find out anything" (G. A. 2). Pringleton called and met Papalardo some seven months later (G. A. 3–4), and told him he wanted two ounces of heroin. Papalardo replied that "Art," who had come with Papalardo, would "take care of" him (G. A. 5). On Art's instructions, Pringleton met Art and petitioner Lavelle later that evening (G. A. 5, 6), Lavelle being introduced as the one who "would handle things from here on in" (G. A. 7). As they drove, Pringle-

ton paid Lavalle for the narcotics (G. A. 8) and the latter pointed out the package lying on a lawn strip (G. A. 8).

Pringleton then left the Lavelle car and entered his own car. As previously arranged, he was followed by Bailey Douglas to whom he had agreed to sell the drugs (G. A. 8–9). Douglas took the drugs from the lawn strip when Pringleton pointed them out (G. A. 9). On the morning of January 31 (G. A. 10), a second such sale from Lavalle to Pringleton to Douglas was effected (G. A. 9–12) and on that evening Pringleton was arrested (G. A. 12). Douglas was also arrested on that day (G. A. 16, 17). Shortly thereafter, Pringleton became a special employee of the narcotics service (P. A. 16–18).

On June 15th a radio transmitter was hidden on Pringleton's person by narcotics agents Voll and Ellis (G. A. 21, 28), who placed the receiving unit in their car (G. A. 22, 28). After testing it for proper adjustment (G. A. 29, 30), they followed Pringleton's car part of the way to the area where he was to meet Papalardo and Lavelle (G. A. 30). On arrival there, they spotted and overtook Papalardo's car, driven by Papalardo, in which Pringleton and Lavelle were riding (G. A. 31, 36). Both agents in the pursuing car were able to distinguish the voices of the three (G. A. 24, 38–40). Papalardo was overheard advising Pringleton that he could go through with a de-

livery of three pieces (ounces) to "Eddie" (this sale constituted the fourth count of the indictment), but Papalardo insisted that in the future Pringleton was to do business without causing Papalardo to meet the customers (G. A. 24).

Pringleton made arrangements with Lavelle (G. A. 25, 40, 41) to pick up six and three-quarter ounces of heroin (count 3 of the indictment). Papalardo remarked that the "new stuff," of which this consignment was to be made, was "very good stuff" and that even his enemies were coming to him for it (G. A. 25–26, 42). Pringleton complained of Lavelle's apparent refusal to deliver to him on consignment, to which Papalardo replied that Lavelle had to pay for it himself (G. A. 40). There was further conversation in which Papalardo explained his method of delivery during the days when he himself had been in Pringleton's part of the operation (G. A. 24, 43). Papalardo ordered that no phone calls be made to him (G. A. 26, 43). Both agents testified to making memoranda of these overheard conversations immediately after abandoning their shadowing of petitioner's car (G. A. 25, 39, 44).

ARGUMENT

1. Petitioners raise in this Court, for the first time, objections to the testimony (on Fourth Amendment and other grounds) with respect to the conversations overheard on the short wave

set.[2] While the court of appeals might, in the exercise of its discretion, have considered these issues though not raised in the trial court, *On Lee* v. *United States,* 343 U. S. 747, it received no opportunity to do so.[3]

The decision of this Court in the case of *On Lee* v. *United States,* 343 U. S. 747, is precisely in point save that there the protested "search" occurred in a building whereas here the "search" occurred in an automobile moving on the open highway. There, as here, no trespass was committed by the government's operatives. This Court decided that the use of mechanical devices under such circumstances to obtain admissions against interest does not violate the Fourth Amendment.

On Lee also held that the use of the transmitter and receiver did not violate the Federal Communications Act, 47 U. S. C. 605, since "there was no interference with any communications facility which he possessed or was entitled to use" (343 U. S. at 754).

2. There was ample evidence to justify the convictions of petitioner Papalardo on all four

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[2] On trial, petitioners first made only general objections (G. A. 23). After being overruled, they stated their ground as lack of identification of the voices heard by the agents. Satisfactory testimony as to identification was then introduced (G. A. 24, 37–39).

[3] Petitioners' only reference to the subject in their brief below was with respect to the qualifications of the instruments and to the fact that the conversations heard were only portions of conversations.

counts of the indictment.[4] In the first (January 24th) sale Papalardo, who had previously suggested that Pringleton handle narcotics for him (G. A. 2), introduced Pringleton to the person who "would take care of" him (G. A. 4, 5). With respect to the sales in June, Papalardo referred to the three ounce sale stating that he did not want to meet the purchasers (G. A. 24) and discussed his own method of delivery of narcotics (G. A. 24). When Pringleton was arranging with Lavelle to pick up the six and three-quarter ounce delivery, Papalardo discussed the merits of the heroin which he described as so good that "my enemies are buying it from me" (G. A. 25–26). There was thus ample evidence from which the jury could infer, as the judge charged they had to find in order to convict (G. A. 49), that Papalardo stimulated and encouraged, and actually participated in, the sales charged as substantive offenses. See *Pereira* v. *United States*, 347 U. S. 1, 10–11.

As to the conspiracy count, there was ample evidence to prove that Papalardo was part of a group of "wholesalers" and "retailers" who conspired to sell narcotics illegally. The fact that some of the overt acts of the conspiracy were proved as substantive offenses does not constitute double punishment since the elements of con-

[4] Lavelle's participation seems too obvious to require discussion and is not argued in the petition.

spiracy are clearly different. *Pereira* v. *United States,* 347 U. S. 1, 11; *United States* v. *Bayer,* 331 U. S. 532; *Pinkerton* v. *United States,* 328 U. S. 640.[5]

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[5] Petitioners also assert in their argument other alleged errors at the trial. They claim error in the court's refusal to give requested Instructions 5 and 15 to the effect that "mere knowledge that a co-conspirator is engaged in other criminal conspiracies * * * is not sufficient to make a conspirator a party thereto" and that mere presence at the scene or association with others charged with crime is not sufficient to convict (Pet. 16). It seems sufficient to state that these instructions were too far removed from the evidence to require inclusion in the court's charge. The judge specifically charged as to Papalardo that the jury had to find that he aided and abetted or "consciously participated in" the sales charged as substantive offenses (G. A. 49).

Petitioners claim that there was also error in the admission of the testimony of Rollins and Douglas is likewise without merit. They were members of the chain of middle men in the handling of the narcotics which flowed down from Lavelle and Papalardo to co-conspirator Pringleton, thence to Douglas, and finally to Rollins who was working with narcotics agent Laster. This testimony helped establish the facts of the sales and their illicit character since some of the marked money issued by Laster was found on both Pringleton and Douglas.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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